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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-464

ALFAR DAIRY, INC.,

Petitioner,

v.

PALM BEACH COUNTY BOARD OF PUBLIC INSTRUCTION
(Now statutorily entitled School Board of
Palm Beach County, Florida),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Respondents, School Board of Palm Beach County, Florida, respectfully request that a Writ of Ceriorari be denied to the Petitioners and that the decision of the United States Court of Appeals for the Fifth Circuit entered on April 25, 1972 (rehearing and rehearing en banc denied on June 23, 1972), which reversed the Order on Review of the U.S. District Court for the Southern District of Florida and reinstated the

Opinion and Order of the Referee in Bankruptcy, be allowed to stand as the law.

OPINIONS BELOW

The ruling of the Referee in Bankruptcy for the United States District Court for the Southern District of Florida, entitled "Opinion and Order" is included herein as part of the supporting record. The opinion of the Court of Appeals for the Fifth Circuit is reported at 458 F.2d 1258 and is included in Petitioner's appendix.

STATUTES INVOLVED

This case involves the following sections of the National Bankruptcy Act:

Section 39(a)(1) (11 U.S.C. Sec. 67);
Section 68 (11 U.S.C. Sec. 108);
Section 313(1) (11 U.S.C. Sec. 713(1));
Section 357(2) (11 U.S.C. Sec. 757);
Section 369 (11 U.S.C. Sec. 769).

QUESTIONS PRESENTED

Although Respondent does not fully understand the logic and relationship between Petitioner's list of "Questions Presented" and the decision of the United States Court of Appeals for the Fifth Circuit, which is the subject of litigation here, Respondent will attempt to show to this Court that said questions are totally without merit.

STATEMENT OF THE CASE

The statement of the Case as presented by the Petitioner, Alfar Dairy, Inc. has omitted several outstanding facts as well as slanting the case toward its point of view, therefore, Respondent, School Board of Palm Beach County, Florida, will briefly describe the history of this case in an unbiased manner. All references to the Record will be as it appeared in the Record-on-Appeal in the Fifth Circuit Court of Appeals.

Throughout this brief, Petitioners will be referred to as "Aflar," "Alfar Dairy," "Debtor in Possession" or "Petitioner." Respondent will be referred to as the "School Board," the "Board," or "Respondent."

On June 8, 1966, there was executed and existing a valid and binding contract between Alfar Dairy, Inc. and the Board of Public Instruction for Palm Beach County (now statutorily entitled The School Board of Palm Beach County, Florida) in which Alfar Dairy was to furnish milk to the School Board for the school year 1966-67 at the price of $.0578 per one-half pint of milk; deliveries to commence, and did commence on August 29, 1966. (R. 80, 82, 104-114, 174, 226).

Thereafter, on October 13, 1966, Alfar Dairy, Inc., filed a voluntary Petition under Chapter XI of the Acts of Congress Relating to Bankruptcy. On the same date, upon proper application the Court appointed Alfar Dairy Debtor in Possession and authorized it to continue the business operation.

On November 22nd, Gordon Nielson, the then President of Alfar Dairy, Debtor in Possession, sent a letter to the Chairman of the School Board of Palm Beach County, Florida, stating that unless an increase in the price of milk to $.0661 per half pint was forthcoming

to Alfar Dairy, Inc., Alfar Dairy would have to reject its contract with The School Board of Palm Beach County. Thereafter, on November 23, 1966, due to this anticipatory breach, the School Board, to prevent an interruption in the delivery of milk to the school children, solicited new bids for the delivery of milk in the two areas which the Debtor in Possession had been serving. New milk contracts were awarded to other companies on December 7, 1966, at a higher price, i.e. $.0668 and $.0689, than was being paid under the contract with Alfar Dairy, Inc. (R. 84-85).

Due to Alfar's breach of its milk supply contract with the School Board, records kept by the School Board and introduced into evidence (R. 130, 171) indicate that the total additional cost to the Board for the balance of the school year, 1966-67, amounted to $40,968.04 (R. 175).

In accordance with the Bankruptcy Act, the Notice to Creditors with the Plan of Arrangement attached was filed with the Court on December 12, 1966 by Alfar Dairy. (R. 1-2). The School Board of Palm Beach County was not delineated in the certificate of mailing, and there is nothing in the record to indicate that notice was given to the School Board. (R. 91, 92 (Referee), 172, Bankruptcy Docket). The Petition did not list the School Board as a creditor whose claim was disputed nor did the Plan of Arrangement specifically reject the executory contract with the School Board. (R. 1-2). On December 15, 1966, the debtor filed an Amended Plan of Arrangement which rejected executory contracts with (a) Palm Beach County School Board; (b) Dade County School Board; (c) Martin County School Board; (d) Hendry County School Board; (e) Glades County School Board. The Bankruptcy Court Docket indicates that notice of the Amended Plan of Arrangement was not

given to creditors, nor to the parties with whom the milk contracts had been executed, subsequent to the filing of the Amended Plan.

On December 16, 1966, the Debtor in Possession filed its Petition for Order to Show Cause (R. 5-6), why the School Board should not turn over sums of money due and owing the Debtor in Possession for dairy products furnished. On December 23, 1966, the School Board filed an answer to the Order to Show Cause (R. 8-9) which answer set up the defense that the Court did not have summary jurisdiction to determine the matter. Upon hearing on the Rule to Show Cause conducted on December 28, 1966, there was no showing that the School Board had received official notice of the rejection of the contract (R. 90-92). The application for confirmation of the Plan of Arrangement (R. 22-23) was filed on April 12, 1967. Likewise, the Order of Confirmation (R. 61-63) approving the original Plan of Arrangement was prepared by the attorney for the debtor and entered by the Court. As is customary with the Court the confirmed Plan of Arrangement was attached to the Order as Exhibit "A". The Bankruptcy Court Docket (first 9 pages of Record-on-Appeal) and the record, itself, indicates that no application for approval of the *Amended* Plan of Arrangement was ever made. Nor does the record indicate that any Order confirming the Amended Plan of Arrangement was ever entered.

Upon hearing on the Order to Show Cause (R. 66), a memorandum submitted by counsel and arguments, the Court entered its "Order Determining Summary Jurisdiction and Setting Date for Further Proceedings" (R. 70-71) finding that: (1) The Court had summary jurisdiction to determine the issues raised by debtor petitioners; (2) The School Board owed the debtor the

sum of $36,381.45 for milk and ice cream delivered upon open account; (3) The Court reserved ruling on the right of the School Board to set off the funds held by it and set a date for further hearing on the question of damages sustained, if any, by the School Board as a result of the rejection of the contract by the debtor.

The Court subsequently entered its "Amended Order Determining Summary Jurisdiction and Setting Date for Further Proceedings (R. 72-73) because the damages alleged by the School Board could not be definitely ascertained until the end of the school year and set the cause for further hearing on June 28, 1967. The School Board, thereafter, filed its petition for review of the order determining summary jurisdiction. The Honorable William O. Mehrtens, Judge of the District Court, entered his order affirming the referee on the grounds that the petition for review was not timely filed.

After hearing testimony of witnesses and argument of counsel, at the Continued Hearing on the Order to Show Cause on the 28th day of June, 1967, the Referee in Bankruptcy entered its Opinion and Order (R. 172-176) dated May 28, 1970, which specifically found: (1) That there was a valid contract between the School Board and Alfar for furnishing by Alfar of milk and ice cream to the Palm Beach County Schools during the 1966-67 school year; (2) That there was a breach of said contract by the debtor and that the School Board readvertised for new bids for furnishing milk and ice cream for the balance of the 1966-67 school year. That the School Board subsequently re-let the contract to the lowest acceptable bidder at a rate higher than that originally contracted for with the debtor and that there was no obligation upon the part of the School Board, as contended by the attorney for Alfar, to allow Alfar to rebid upon this

contract which Alfar alleges would have mitigated the damages sustained by the School Board. (3) That the damages sustained by the School Board by reason of Alfar's default amounted to $40,968.04 and that funds retained by the School Board owed to debtor upon open account amounted to $36,381.45. (4) That the Order of Confirmation approved the original Plan of Arrangement as submitted by the debtor and that said plan did not reject the executory contract between the debtor and the School Board.

Based upon the foregoing findings the Referee concluded that: "The Bankruptcy act provides two (2) methods by which the rejection of executory contracts of a Chapter XI debtor may be made. These two methods are:

a. Section 313(1) permits the rejection upon notice to the parties to such contracts, and

b. By providing for the rejection of such contracts in the Plan of Arrangement itself pursuant to Section 357(2)"

The Referee further concluded:

"In the case at hand, Alfar evidently attempted to reject the executory contract with the School Board in accordance with the second method set forth above by including the rejection in an Amended Plan of Arrangement. Both of the two methods for rejection of executory contracts require notice of such rejection to be served on the other party to the contract. Here there was no notice served on the School Board, and, in fact, the *Amended* Plan of Arrangement was never confirmed. The only order of confirmation that was entered by this Court was on the original Plan of Arrangement. Consequently, this Court concludes that the executory contract with the School Board was never terminated in

accordance with the provisions of Chapter XI of the Bankruptcy Act."

"Secondly, the Court concludes that the debt owing by the School Board to Alfar and the debt owing by Alfar to the School Board in the amounts found to be due herein constitute the requisite mutuality required by Sec. 68 of the Bankruptcy Act. Consequently, the School Board is allowed a set-off against Alfar."

In accordance with the foregoing findings and conclusions the Referee ordered that the School Board was allowed damages in the amount of $40,968.40; that the School Board owed Alfar $36,381.45 and that after allowing the set-off, there remained an unsecured claim in favor of the School Board in the amount of $4,586.59.

Subsequent to the entry of the Opinion and Order of the Referee, Alfar Dairy filed a Petition For Reconsideration on June 5, 1970 (R. 177). Said Petition for Reconsideration was denied on October 20, 1970. (R. 192).

Thereafter, on June 8 and June 9, 1970, Alfar filed its Petition For Review for the "Debtor in Possession" and its Petition For Review for the "Debtor" respectively. (R. 178-180, 181-186). Both of these Petitions alleged in summary that the Referee committed error in making the Order and Opinion.

The District Court reversed the Referee's Opinion and Order (R. 225-230) taking the position that the School Board was a creditor arising from the rejection of the contract by the Debtor, Alfar Dairy, Inc., under Section 369 of the Bankruptcy Act and was required to file a Proof of Claim. The Court further ruled that the Debtor could not set-off its claim against the monies due and owing by said creditor to the Debtor in Possession.

Thereafter, the School Board appealed the District Court's Order to the United States Court of Appeals for the Fifth Circuit. After reviewing the record and briefs, and hearing oral argument the Court of Appeals reversed the District Court's Order on Review (Reported at 458 F.2d 1258) and reinstated the Findings and Conclusions of the Referee except as to the amount involved.

Following a Petition for Rehearing and Petition for rehearing en banc submitted by Alfar Dairy, the Fifth Circuit Court of Appeals in a Per Curiam opinion on June 23, 1972, denied both the Petition for Rehearing and the Petition for Rehearing en banc.

Hence, this Petition for Writ of Certiorari was filed.

REASON FOR DENYING THE WRIT OF CERTIORARI

The Decision of the Fifth Circuit justifiably and correctly reinstates the Findings and Conclusions of the Referee in Bankruptcy, a legal expert who deals exclusively and daily with one area of the law, namely Bankruptcy. Petitioner erroneously seeks to invoke the jurisdiction of this Court by stating that The Fifth Circuit failed to interpret Chapter 11 of the National Bankruptcy Act in accordance with his belief, but no where in his Petition does Petitioner show that the Fifth Circuit decision conflicts with a decision of another Court of Appeals; or that the Fifth Circuit Court has decided an important question of federal law which has not been, but should be, settled by this Court; or that the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of this court; or that the Court has decided a federal question in a way in conflict with applicable decisions of the United States Supreme Court;

or that the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court to call for an exercise of the United States Supreme Court's power of supervision. Petitioner is seeking to invoke the jurisdiction of this court basically by presenting only a partial set of facts and hoping that this Court will fail to recognize the full fact situation, thus the reasoning of the Fifth Circuit.

To point out these discrepencies, Respondent respectfully directs this Court's attention to Page 7 of Petitioner's brief whereby it is stated:

"If permitted to stand, the decision or opinion of the Fifth Circuit would henceforth require the payment in full upon *confirmation of any plan of arrangement*, of all damages resulting from any prior existing contract terminated either by the debtor, the debtor in possession, or the other contracting party, after the filing of the Petition in Bankruptcy." (Emphasis added)

A close reading of the Fifth Circuit's opinion, 458 F.2d 1258, footnote number 5, clearly indicates that the Amended Plan of Arrangement which rejected the executory contract with the School Board of Palm Beach County, Florida *was never confirmed.* The Court stated:

> "§§39(a)(1) and 58(c) of the (Bankruptcy) Act require the Referee to give Notice to interested parties of relevant proceedings in a bankruptcy action. It is at least arguable, therefore, that the failure to give notice to the Board of the Amended Plan was the fault of the Referee, not Alfar. If the case turned on this failure of notice we would have to delve deeper into the question of responsibility for notice. It does not, however, since there is no question that responsibility for getting the Amended

Plan confirmed clearly rested on Alfar. The plan was never confirmed. Consequently, the Board's contract was never rejected."

The Record itself is the basis of the ruling by the Fifth Circuitt (R. 8, 91, 173, Bankruptcy Docket comprising the nine pages immediately preceding page 1 of the Record-on-Appeal, which indicates that no application for confirmation of the Amended Plan was ever filed).

As can readily be seen Petitioner has made the statement that the Fifth Circuit's decision would require the payment of damages resulting from termination of any prior existing contract upon *confirmation* of any plan of arrangement. Yet, Petitioner does not advise this Court that this was not the fact situation involved here, to-wit: there was *never confirmation* of the Amended Plan of Arrangement which rejected the executory contract.

In addition, the Petitioner in probing for any jurisdictional ground which might allow him to invoke the listening ear of this High Court incomprehensively declares the issues of this case to be in conflict with other cases of this type, or, if not in conflict, he states, the issues are of far-reaching importance which ought properly to be resolved. The issues which Petitioner refers to (Page 8 - Petitioner's Petition) are that the decision of the Fifth Circuit renders nugatory Chapter 11 of the Bankruptcy Act by precluding or inhibiting the rejection of onerous and burdensome executory contracts of the debtor. Such a proposal is entirely without merit. The Fifth Circuit decision leaves intact Chapter 11 proceedings and the rejection of executory contracts. However, the Court of Appeals does point out that rejection of any executory contract is not valid until confirmed. In support thereof, the Court quotes *Collier*

Bankruptcy Manual Ch. XI - 8, p. 1226, which provides in part:

> "Section 357(2) (of the Act) permits an arrangement to include" provisions for the rejection of any executory contract" ... Under Section 357(2), the debtor is given the absolute right to reject any of his executory contracts, *subject to confirmation of the arrangement. Unless and until the arrangement is confirmed, the rejection is not effective, ... Rejection under Section 357(2) cannot be tacit; the arrangement must expressly provide for rejection in order to effect such.* The contract must be rejected in its entirety, or not at all." (Emphasis added).

As can readily be seen the Court of Appeal's decision in no way disallows rejection of executory contracts by the debtor in a Chapter 11 proceeding. On the other hand, as previously expressed, it does disallow rejection until the plan of arrangement, which rejects the contract, is confirmed. The Court's decision vividly points out that the Amended Plan of Arrangement which rejected the executory contract with the Respondent School Board was never confirmed.

To further point out the individual fact situation of this case upon which the Fifth Circuit based its's decision, Respondent cites the case of *Re Greenpoint Metallic Bed Co.*, 113 F.2d 881, which stated:

> "The other party to an executory contract with the debtor occupies an equivocal position at the inception of an arrangement proceeding. Until his contract is rejected he is not a creditor with a provable claim ... The statute does not authorize a tacit rejection of an executory contract, and express provisions of rejection are required to effect the terms of an arrangement."

Since Alfar Dairy, Inc. never rejected the contract in accordance with the Bankruptcy Act procedure, the School Board never became a creditor with the right to file a claim.

Again on page 9 and 10 of Petitioner's Brief, petitioner advances five hypothetical situations whereby a creditor could breach a contract with a debtor or debtor in possession and be protected by the holding below. Petitioner further adds that by allowing such, the Fifth Circuit in the case at bar, is ruling contrary to law and Congressional intent by requiring that all such creditor claims for damages will be treated as administrative expenses in the Chapter 11 proceedings, imposing the necessity of payment in full in cash upon confirmation of a plan submitted by the Debtor.

To even consider that the Fifth Circuit ruling below advances such a postulate is unreasonable and leads one to believe that Petitioner did not fully read nor understand the decision below. The ruling below very vividly points out that the Bankruptcy Act provides two methods in which a Chapter XI debtor may reject any executory contract and thereby be relieved of the contract and any damages which may be suffered by the creditor, due to the rejection. These methods include

A. Section 313(1) permits the rejection upon notice to the parties to such contracts, and

B. By providing for the rejection of such contracts in the Plan of Arrangement itself pursuant to Section 357(2).

The Court below further added that Alfar evidently attempted to reject the contract by the second method, i.e. by including the rejection in an Amended Plan of Arrangement. But the Court concluded that here there was no notice of the rejection served on the School Board

and, in fact, the Amended Plan of Arrangement was never confirmed. The only order of confirmation that was entered was the original Plan of Arrangement. Consequently, the executory contract with the School Board was never terminated in accordance with the provisions of Chapter XI of the Bankruptcy Act.

Therefore, in effect, the decision below is merely advancing the rule of law that where a bankrupt debtor, by inadvertance or otherwise, does not abide by the Bankruptcy Act in rejecting executory contracts with creditors, the creditors are then prejudiced by knowing that the debtor has ceased to perform on the contract but having no notification to allow them to file a proof of claim as a creditor. The decision below indicates that any other rule could result in chaos and injustice in bankruptcy proceeidngs, which often involve hundreds of parties and strict statutory deadlines for filing claims.

The second major contention of Petitioner as to why a Writ of Certiorari should be granted to review the lower court decision is petitioners claim of lack of mutuality between the two debts. However, Petitioners have not cited one single case which would deny the set-off as allowed by the Fifth Circuit. The cases which have been cited by petitioner are entirely different and distinguishable from the facts of the present case. For example, in the *American Capital Corporation v. Operative Greenwald Bakeries, Corp.* case (New York Civil Court) petitioner states that summary judgment was granted in favor of the trustee in bankruptcy on the ground that a creditor was not entitled to set-off a pre-bankruptcy debt by the debtor against the creditor's own debt to the debtor in possession, which was incurred after the petition under Chapter II had been filed. To the contrary, in the present case, as the Court below so

vividly clarified, both debts occurred after Alfar became debtor-in-possession, to-wit, October 13, 1966.

In the *Lignacraft v. Automation Services, Inc.* case, 324 N.Y.S.2d 521, another state court decision, the creditor's claim was barred because it was discharged by the confirmation of the plan of arrangement, not because of lack of mutuality. In the present case, the amended plan of arrangement which rejected the contract was never confirmed, therefore, the ruling of the *Lignacraft* case could not apply here.

Petitioner continues to reflect that the position of the Fifth Circuit in holding that Alfar's claim against the Board which accrued during the period of Debtor-in-possession and the Board's set-off's which, likewise, occurred after appointment of Alfar as Debtor in Possession, was erroneous. Yet, Petitioner does not cite any law or reasoning why this set of facts cannot constitute a valid situation of set-off as contemplated by the Bankruptcy Act. One attempt on the part of petitioner explaining why this cannot be allowed is his quotation of Section 313(1) of the Bankruptcy Act pertaining to notice of rejection of an executory contract. In citing such provision petitioner has again contradicted himself. As stated early in the decision below and by the Referee's Opinion, there are only two methods of rejection of an executory contract by a debtor or debtor-in-possession, to-wit: pursuant to Section 313(1) or Section 357(2) of the Bankruptcy Act. Alfar chose the second method, i.e. 357(2) through the use of a Plan of Arrangement. Therefore, Section 313(1) of the Bankruptcy Act does not apply to Alfar in this case.

The Bankruptcy Act is specific as to when a set-off can be allowed in a Chapter II proceeding, Section 68 of the Act provides:

> "a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set-off against the other, and the balance only shall be allowed or paid."

As stated in the opinion below, the requisite mutuality in accordance with Section 68 did exist in the present case, to-wit:

> the School Board's claim was against the Debtor in Possession, and, in turn, the monies owing by the School Board were to the debtor in possession.

The debts and credits were in the same right and between the same parties standing in the same capacity. Therefore, the School Board was properly allowed to set-off its damages against the amount owed to Alfar.

Petitioner courageously attempts to circumvent the mutuality by saying that the contract was that of the debtor, but the School Board's claim was against the debtor-in-possession. To allow such a distinction here would truly be illogical as the debtor and debtor-in-possession came into existence simultaneously on the same date October 13, 1966. The Fifth Circuit in so holding that set-off was available has not contradicted any established law, but has merely interpreted Section 68 of the Bankruptcy Act in the manner that congress intended that it be interpreted.

No where in petitioner's brief does he point out any Federal law or case law which would disallow the mutuality as established in this case.

Finally on page sixteen of Petitioner's brief, petitioner attacks the Fifth Circuit's ruling in allowing the School Board an unsecured claim against Alfar for the excess of the damages over Alfar's claim against the School Board.

Petitioner boldly states that the Court below allowed such a claim even though the Board did not file a proof of claim, when all other creditors were required to do so. But petitioner does not inform the Court that Federal law does not allow a creditor to file a proof of claim until its contract is actually rejected. In support thereof, Respondent cites Collier's on Bankruptcy, Volume eight, Paragraph 3.15 at page 227, where it is stated:

> "As this court pointed out in *Mohonk Realty Corp. v. Wise Shoe Stores, Inc.*,2 Cir., III F.2d 287, the holder of an executory contract with the debtor occupies an equivocal position. *Until his contract is rejected he is not a creditor with a provable claim.*" (Emphasis added)

In addition, see *Re Greenpoint Metallic Bed Co., supra,* to-wit:

> "The other party to an executory contract with the debtor occupies an equivocal position at the inception of an arrangement proceeding. Until his contract is rejected he is not a creditor with a provable claim. . .".

Since Alfar Dairy, Inc. failed to reject the executory contract with the School Board by affirming the Amended Plan of Arrangement, the School Board's rights as a creditor never evolved. Therefore, the School Board's only means of recovering its damages for breach of contract by Alfar was by way of set-off and unsecured claim for the excess as properly allowed by the Court below.

CONCLUSION

Although petitioner has verbosely attacked the opinion of the Fifth Circuit below, he has not shown any reasons pursuant to Rule 19 of the Rules of the Supreme Court

of the United States why a Writ of Certiorari should be granted. Petitioner has presented no conflict between this decision and the decision of other Court of Appeal or decisions of the United States Supreme Court. Neither has he shown that this decision is different from the accepted and usual course of judicial proceedings. In fact, the Fifth Circuit decision directly parallels the Congressional intent of Chapter XI proceedings by requiring strict adherence to statutory deadlines. As stated by the Court below "any other rule could result in chaos and injustice in bankruptcy proceedings, which often involve hundreds of parties and strict statutory deadlines for filing claims." Contrary to petitioners claim that the decision below runs counter to the nature and essential purpose and disrupts the orderly administration of Chapter XI proceedings, the Fifth Circuit's opinion has clarified the law that ad hoc compliance with the Bankruptcy Act will not and cannot be tolerated.

For the foregoing reasons, Respondent respectfully requests this Court to deny petitioner's Writ of Certiorari and allow the sound decision of the Fifth Circuit Court of Appeals to remain as law.

Respectfully submitted,

MICHAEL E. JACKSON
JAMES M. GANN
230 Royal Palm Way
Palm Beach, Florida

Attorneys for Respondent

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN THE MATTER OF:

ALFAR DAIRY, INC.,
a Florida corporation,
Debtor.

Case No. 66-479-Bk-WM

OPINION and ORDER

This cause is before the Court on the petition filed by the debtor Alfar Dairy, Inc., a Florida corporation, for the entry of an Order to Show Cause why the Palm Beach County School Board should not turn over to the debtor in possession the sum of $24,489.00 for dairy products and ice cream supplied by the debtor to the Palm Beach County School Board. The Palm Beach County School Board, hereinafter called the School Board, answered Alfar's petition, pleading, among other things, that this Court did not have summary jurisdiction over this dispute.

The case was commenced on the 13th day of October, 1966, as a Plan of Arrangement under Chapter XI of the Bankruptcy Act. Notice to Creditors with Plan attached was given on the 13th day of December, 1966, and certificate of mailing was filed December 13, 1966. The School Board was not delineated in the certificate of mailing, and there is nothing in the record of proceedings to indicate that notice was given to the School Board. The petition did not list the School Board as a creditor whose claim was disputed or did the Plan of Arrangement specifically reject the executory contract with the School Board. On December 15, 1966, the debtor filed an

Amended Plan of Arrangement which specifically rejected executory contracts with: (a) Palm Beach County School Board (b) Dade County School Board (c) Martin County School Board (d) Hendry County School Board and (e) Glades County School Board. The Court file indicates that notice of the Amended Plan of Arrangement was not given to creditors subsequent to the filing of the amended plan. Upon hearing on the Rule to Show Cause conducted on December 28, 1966, there was no showing that the School Board had received notice of the rejection (CP #166, pages 14, 15 and 16) although the School Board had actual knowledge that the debtor did not intend to fulfill the executory contract between the parties. The Order of Confirmation (CP #63) approving the original plan of arrangement was prepared by the attorney for debtor and entered by the Court. No petition for approval of the *Amended* Plan of Arrangement was ever made.

Upon hearing on the order to show cause (CP #91), a memorandum submitted by counsel and arguments, the Court entered its "order determining summary jurisdiction" finding that: (1) The Court had summary jurisdiction to determine the issues raised by debtor petitioners. (2) The School Board owed the debtor the sum of $36,381.45 for milk and ice cream delivered upon open account. (3) The Court reserved ruling on the right of the School Board to set off the funds held by it and set date for further hearing on the question of damages sustained, if any, by the School Board as a result of the rejection of the contract by the debtor.

The Court subsequently entered its "amended order determining summary jurisdiction and setting date for further proceedings" (CP #161) because the damages alleged by the School Board could not be definitely

ascertained until the end of the school year and set the cause for further hearing on June 28, 1967. The School Board, thereafter, filed its petition for review of the order determining summary jurisdiction (CP #107). The Honorable William O. Mehrtens, Judge of the District Court, entered his order affirming referee (CP #161) on grounds that the petition for review was not timely filed.

Hearing was thereafter held pursuant to the amended order determining summary jurisdiction and setting date for further proceedings and at the designated time the parties advanced testimony and memorandums were submitted and it is thereupon that the Court finds:

1. That there was a valid contract between the School Board and Alfar for furnishing by Alfar of milk and ice cream to the Palm Beach County Schools during the 1966-67 school year.

2. That there was a breach of said contract by debtor and that the School Board readvertised for new bids for furnishing milk and ice cream for the balance of the 1966-67 school year. The School Board subsequently re-let the contract to the lowest acceptable bidder at a rate higher than that originally contracted for with the debtor and that there was no obligation upon the part of the School Board, as contended by the attorney for Alfar, to allow Alfar to rebid upon this contract which Alfar alleges would have mitigated the damages sustained by the School Board.

3. That the damages sustained by the School Board by reason of Alfar's default amounts to $40,968.04 and that funds retained by the School Board owed to debtor upon open account amount to $36,381.45.

4. That the order of confirmation (CP #63) approved the original Plan of Arrangement as submitted by debtor

and that said plan did not reject the executory contract between debtor and the School Board.

5. At no time during these proceedings was the *amended* plan of arrangement effectively confirmed.

It is upon the foregoing findings of fact that the Court makes the following conclusions of law:

The bankruptcy act provides two (2) methods by which the rejection of executory of a chapter XI debtor may be made. These two methods are as follows:

a. Sec. 313(1) permits the rejection upon notice to the parties to such contracts, and

b. By providing for the rejection of such contracts in the Plan of Arrangement itself pursuant to Sec. 357(2).

In the case at hand, Alfar evidently attempted to reject the executory contract with the School Board in accordance with the second method set forth above by including the rejection in an Amended Plan of Arrangement. Both of the two methods for rejection of executory contracts require notice of such rejection to be served on the other party to the contract. Here there was no notice served on the School Board, and, in fact, the *Amended* Plan of Arrangement was never confirmed. The only order of confirmation that was entered by this Court was on the original Plan of Arrangement. Consequently, this Court concludes that the executory contract with the School Board was never terminated in accordance with the provisions of Chapter XI of the Bankruptcy Act.

Secondly, the Court concludes that the debt owing by the School Board to Alfar and the debt owing by Alfar to the School Board in the amounts found to be due herein constitute the requisite mutuality required by Sec. 68 of

the Bankruptcy Act, consequently, the School Board is allowed a set-off against Alfar, and it is thereupon that it is accordingly

ORDERED, ADJUDGED and DECREED:

1. That the Palm Beach County School Board be and it is hereby allowed damages in the total amount of $40,968.40.

2. That there is due and owing by the Palm Beach County School Board to the debtor Alfar Dairy, Inc. the total sum of $36,381.45.

3. That after allowing a set-off of debt owing to Alfar Dairy, Inc., Debtor, from the Palm Beach County School Board against amounts found to be owing to Palm Beach County School Board from Alfar Dairy, Inc., Debtor, there remains an unsecured claim in favor of the Palm Beach County School Board in the amount of $4,586.59.

DONE and ORDERED at Miami, Florida, this 28th day of May, 1970.

/s/J. Howard Houston
REFEREE IN BANKRUPTCY